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been cited before us, in which it seems to us that the learned Judges, when speaking of the partition of revenue-paying estates were speaking of the partition of such estates into several revenue-paying estates. That is a totally different thing from the partition of the lands within an estate as between the sharers leaving the whole estate liable for the whole revenue, which is the case before us.

For these reasons we think that this case is concluded by the case of *Zahrun* v. *Gowri Sunkar* (1) which I have cited, and with which we entirely agree, and this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

CRIMINAL REVISION.

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January 14.

Before Mr. Justice Pigot and Mr. Justice Macpherson.

GANOURI LAL DAS (AND OTHERS) *v.* THE QUEEN-EMPRESS.*

Rioting—Unlawful Assembly—Right of Private defence of property—Penal Code (Act XLV of 1860), *ss.* 97, 103, 104, 105, 141 *and* 147.

A party of persons, consisting of some five peadas and a number of coolies sufficient for the work to be done, went to a spot on a river flowing through the lands of *M* for the purpose of either repairing or erecting a *bund* across it to cause the water to flow down a channel on to the lands of their master *T*. The river at the time was almost dry, and the party did not go armed ready to fight or use force, and they did not during the subsequent occurrence use force. Having arrived at the spot about 10 A.M. they proceeded to work at the *bund* until the afternoon. At about 4 P.M. a body of men, consisting of about 1,200 in all, many of them armed with *lathies* and headed by the prisoners, who were servants of *M*, which had been seen collecting together during the day, proceeded to the spot, and about 25 or 30 of them attacked *T's* men, some five of whom were more or less severely wounded with the *lathies*.

The occurrence resulted in the conviction of some of *M's* servants for rioting under s. 147 of the Penal Code.

* Criminal Revision No. 405 of 1888, against the order passed by C. A. Wilkins, Esq., Sessions Judge of Bhagulpore, dated the 6th of November 1888, affirming the order passed by Baboo Poorno Chunder Mitter, Deputy Magistrate of Bhagulpore, dated the 24th of September 1888.

(1) I. L. R., 15 Calc., 198.

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M's people wholly denied any right on the part of *T* to construct or repair the *bund*, and had previously denied the existence of such right, and refused permission to *T* to exercise it. It was contended that the assembly of *M's* people was not an "unlawful assembly;" that the interference by *T's* people with the channel of the river justified them in coming to stop the work, and the show and use of force in compelling them to do so.

Held, that the prisoners had been rightly convicted.

Held, further, that as no right of private defence of property is conferred by the Penal Code, except as against the perpetrators of offences under the Penal Code, and that as, upon the facts of the case as found, no offence had been committed by *T's* people, their acts amounting merely to a civil trespass, and that as there was no pressing or immediate necessity of a kind, shewing that there was not time to have recourse to the protection of the public authorities, no question as to the right of private defence arose in the case.

It was further contended that *M's* people did not assemble to enforce a right or supposed right within the terms of s. 141 of the Penal Code, but to defend a right, and that such action did not make the assembly an unlawful one.

Held, that they were members of an assembly the common object of which was, by show of criminal force and by criminal force, if necessary, to enforce the right to keep the river channel clear by preventing the construction of the *bund*, and by demolishing it so far as it was constructed, and that the case came within s. 141, para. (4).

Queen v. *Mitto Sing* (1), *Shunker Singh* v. *Burmah Mahto* (2), and *Birjoo Singh* v. *Khub Lall* (3), referred to and commented on.

IN this case the petitioners were convicted by the Deputy Magistrate of Bhagulpore of rioting under the provisions of s. 147 of the Indian Penal Code, and sentenced to undergo one year's rigorous imprisonment each, and to enter into recognisance bonds in the sum of Rs. 200 each to keep the peace for a period of two years, or in default to undergo two years' simple imprisonment.

Against that conviction and sentence they appealed to the District Judge, who confirmed the conviction and sentence. On the 28th November they applied to the High Court under its revisional powers to send for the record, and to set aside the conviction and sentence on grounds which appear sufficiently in the judgment of the High Court.

(1) 3 W. R., Cr., 41. (2) 23 W. R., Cr., 25.
(3) 19 W. R., Cr., 66.

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On that application a rule was issued calling on the District Magistrate to show cause why the conviction and sentence should not be set aside, and the prisoners were released on bail pending the hearing of the rule.

The rule now came on to be heard.

Mr. *Woodroffe*, Mr. *Evans*, Mr. *Bonnerjee*, Mr. *M. Ghose* and Mr. *M. P. Gasper*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Taruck Nath Palit*, Baboo *Jogesh Chunder Dey*, Baboo *Jogendra Chunder Ghose* and Baboo *Monmotho Nath Mitter* in support of the rule.

Mr. *Phillips* and Baboo *Umakali Mukerjee* for the prosecution.

The facts of the case appear fully stated in the judgment of the High Court and in that of the District Judge, the material portion of which was as follows:—

"The facts are these. Some three years ago, in 1293 F. S., the Thakur's family of Barari in Bhagulpore, purchased a six-annas odd share in village Fazilpore. The lands of this village are irrigated by a water-course, known as the Sanis *Daur*, which issues from the river Karalya. On both banks of this river lie the lands of a native lady, whose husband is known as the "Mohashoyji;" her brother is Baboo Surjya Narain Singh, a leading pleader of this Court; and it is a matter of public notoriety, and has been more than once asserted at the hearing of the appeal without denial, that this pleader is the general adviser of the Mohashoy and of the latter's wife, who rarely acts without his advice.

"The Thakur's family claim to have acquired by their purchase the right to erect or keep in repair a *bund* or embankment across the Karalya river, just at its junction with the Sanis *Daur*, with the object of diverting the waters of the stream into the water-course, and thus to irrigate the lands of Fazilpore. Accordingly, on the 24th June last, their local agents took a body of coolies to the spot to repair or renew this embankment. Whilst they were at work, they noticed that a number of men were being collected together. They appear to have come at once to the conclusion that the Mohashoy's people were about to oppose them in force; and I cannot help thinking that they

knew that they had reason to believe that such a result might ensue. A messenger was at once sent off to Bhagulpore, a distance of some twelve miles. He came first to Barari, and thence went to the thannah where he arrived at 11 P. M., and lodged his information.

"In the meantime, the threatened attack had been delivered; a large body of men, said to amount to some 1,200 in all, advanced to where the work was going on, headed by the appellants. After the usual preliminary discussion, the order was given to attack, and some 25 or 30 of the rioters detached themselves from the main body and fell upon the Thakur's men, five of whom were more or less severely wounded with *lathi* blows; then the rioters dispersed.

"The Sub-Inspector, who had been in the interior when information had been lodged the previous night, was on the spot next day. He commenced his investigation. On the 2nd July a counter-charge was laid by the appellant Ganouri; this also was investigated, and ultimately members of both parties were sent up for trial under charges of rioting. The result is the conviction against which the present appeal is lodged.

"On these allegations, the Deputy Magistrate drew up what he calls three "issues" for determination. The first issue raises the point as to whether the Thakur's men had any right to build a *bund* in the river? The Deputy Magistrate acknowledges that a Criminal Court has no power to determine this issue, and yet, in the same breath as it were, proceeds to answer it, for reasons given, in the affirmative. The question is one purely for a Civil Court to decide; and I may dispose of it in these words, and also by saying that, so far as the record discloses, there does not appear to be any legal evidence to show that it has ever been decided by a competent Court.

"The second issue deals with the question as to whether the Thakurs' men came to repair an existing *bund* or to build a new one? The Deputy Magistrate has decided that they came to build a new one. But, so far as the evidence goes, it seems to me to establish that what they went to do was to erect an embankment on the spot where, as they allege, it stood in previous years; not to build one in an entirely different spot. In fact,

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they went to renew a *bund* which had been entirely washed away, or else to repair one which had been partially washed away; for the purposes of this case it is hardly material to enquire which.

"The third issue puts the question as to whether the Mohashoy's men used force, and, if so, whether the five appellants were of their number? No question of the right of private defence of property is raised. It is not even pleaded; but if, on the facts found, it is proved to exist, none the less will it avail the accused. [See *In re Kali Churn Mookerjee* (1).]

"The first point to ascertain is whether the acts charged by the prosecution are made out, that is, whether the appellant party did attack and beat the Thakurs' party whilst the latter were engaged in working on the *bund*? As to this I have no hesitation in returning an affirmative. The evidence has been very lengthy, and a great deal of time has been taken up both in recording, and in commenting upon it in both Courts. It will be sufficient for me to say that, as a whole, I accept the story for the prosecution; there is no evidence to show that any persons, other than the accused and their party, inflicted the wounds which undoubtedly were inflicted on members of the Thakurs' faction; and there is ample, and it seems to me credible, evidence to show that certain members of the Mohashoy's party did inflict those wounds in the manner alleged.

"The next point to determine is which faction acted on the aggressive? A great deal has been made of the evidence of Babu S. N. Singh (W. 18) and of Sujait (W. 25), and it is contended that this evidence proves conclusively that the Thakurs were perfectly well aware of the fact that they could erect no *bund* except with the express permission of the Mohashoy. I do not agree with this contention. In the first place, the evidence of these two gentlemen does not seem to me to be wholly reliable; the first, at least, must be looked upon as personally interested in this case; and the memories of both of them must have misled them as to what actually occurred. Moreover, all that they say as to the alleged request of Babu Hari Mohun Thakur is nothing more nor less than hearsay. Mr. Ghose, indeed,

(1) 11 C. L. R., 232.

urged that it was admissible as having been elicited in cross-examination. I am unaware of any rule or law which renders hearsay more admissible in cross-examination than in examination-in-chief, and in the case of *Bhatori Mushabaini* (H. C., Cal., Cr. App. No. 337 of 1882,) a Divisional Bench held that hearsay evidence should not be recorded, even on the part of the accused. The evidence might perhaps have been admissible to contradict Babu H. M. Thakur had he been examined, but he was not. Moreover, the letter (Ex. S.) of the 20th October 1887 shows *primâ facie* that Babu H. M. Thakur, though he wished for a settlement of the dispute as to whether he could take "earth" from the Mohashoy's zamindari in order to repair his *bund*, distinctly claimed the right of repairing it when he chose. Further, there is a great deal of oral evidence on the record, which I see no reason to disbelieve, to the effect that such repairs had been constantly made by the Fazilpore Zamindars, aided by the proprietors of adjacent villages whose lands are equally irrigated by means of this water-course. I thereupon come to the conclusion that, whatever right may or may not exist, the Thakurs, in proceeding to repair or renew this embankment, were acting in the *bonâ fide* belief that they were entitled to do so. And I do not find that they proceeded to enforce this (supposed) right in the sense of s. 141, Indian Penal Code, for the repairing party were not larger in number than was necessary for the purpose; they evidently did not go to fight, for they at once informed the authorities when a breach of the peace appeared likely; and they did not go armed and ready to use force. They used no force, this is clear, because not one single wounded man has been produced from amongst the Mohashoy's faction, or from amongst any other assemblage of men.

"This being so, the acts of the Mohashoy's faction were clearly illegal. An earthen *bund* in a running stream cannot be made a permanent erection in a few hours; and there was no imminent danger to the property, for there was little or no water in the stream at the time. There was thus ample time to invoke the interference of the authorities, especially as it seems clear that the working party had been observed at an early hour of the day, before the work could have progressed far. The

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Mohashoy's faction, therefore, were deprived of the right of private defence (s. 99, Indian Penal Code), even if the Thakurs' faction had been the aggressors and were trespassers. Moreover, their resistance (or attack) was not made on the spur of the moment; it was deliberate, after measures had been taken to assemble an overwhelming force. In two words, they took the law into their own hands on an occasion when the law deprives them of the right to do so."

The District Judge then proceeded to go into the question of the identity of the accused, and concluded as follows:—

"For the reasons above given, I confirm the conviction and sentence in the case of each accused. I do not think the sentence at all too severe: these open acts of violence, in defiance of the law, are of such frequent occurrence in these districts, that deterrent sentences are absolutely necessary. I have found by experience that sentences of six months' imprisonment and fine have no deterrent effect; and I have already had occasion to remark that I shall be prepared to uphold more severe sentences in all well-established cases of rioting with *lathial* weapons, such as this one. The medical evidence establishes the fact that the hurt caused to the Thakurs' people, though not "grievous" in the sense of s. 320, Indian Penal Code, was certainly severe in the case of one or two of them; in fact, they got an unmerciful and painful beating with *lathies*. The appellants will surrender to their bail in order to serve out the unexpired portions of the sentences passed upon them."

The nature of the arguments advanced at the hearing of the rule are sufficiently stated in the judgment of the High Court (PIGOT and MACPHERSON, JJ.,) which was as follows:—

This case comes before us in revision.

Ganouri Lall Dass, Dursan Lall Dass, Koonjal Jetti, Murat Singh and Moonshi Singh were convicted, under s. 147 of the Indian Penal Code, of the offence of rioting, by the Deputy Magistrate of Bhagulpore, and sentenced to undergo one year's rigorous imprisonment each, and were further directed in the words of the sentence "to execute recognisance bonds in the sum of Rs. 200 each for keeping the peace for a period of two years, or in default to undergo two years' simple imprisonment each."

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On appeal to the District Judge the conviction and sentence were confirmed, and on the 28th November this rule was obtained in this Court, calling on the District Magistrate to show cause why the conviction and sentence should not be set aside. The prisoners were released on bail pending the hearing of the rule.

One member of the present Bench not having sat in the Bench which granted the rule, we heard the rule opened at length by Mr. *Woodroffe* for three of the petitioners and also heard Mr. *Evans* for the other two. Cause was then shown by Mr. *Phillips* against the rule, and Mr. *Evans* was heard in reply for all the petitioners.

The case was argued at great length; we do not say at too great length, having regard to the importance of some of the questions raised before us.

The chief question discussed before us was, whether the acts of the persons convicted did, under the circumstances of the case, come within the provisions of the Indian Penal Code relating to the offence of rioting?

The disturbances, out of which this conviction arose, took place on the 24th June, at a spot on the river Karalya, close to where a water-course called the Sanis *Daur* (or otherwise the Raggahai Khurra) issues from that river.

Around this spot, and on both sides of the river, are lands belonging to Mohashoy Taruk Nath Ghose, of whose Cutchery Ganouri Lal is tehsildar and Darsan Lal is patwari; the other three petitioners appear to be peadas of the same Cutchery; the Mohashoy is described in the petition in this case as the "master" of the petitioners.

Some distance (about two miles) from the point where the *Daur* issues from the river are the lands of Fazilpore, 6 annas of which were bought in 1293 F. S. by the Thakurs' family of Barari. These lands are irrigated by the water-course, which appears to be supplied from the river alone.

The disturbance of June 24th took place in consequence of a number of persons having on that day gone, under the direction of servants of the Thakurs, to the place where the water-course issues from the river, and having, just below the point of junction, bunded up the course of the river (which was then dry or almost

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dry) for the purpose of diverting the waters of the stream into the water-course. It has been a matter of dispute in the case whether or not there was there at the time a *bund* partially washed away, which these persons repaired or attempted to repair; or whether what they went to do was to construct a *bund*, there being none actually there at the time; and it was denied on the part of the Mohashoy's people that a *bund* had ever been at this spot. The Deputy Magistrate (whose finding we refer to only because it is referred to by the District Judge) holds that the Thakurs' people went "to construct a new *bund* as the one which stood there before was washed away." The District Judge says "they went to renew a *bund* which had been entirely washed away, or else to repair one which had been partially washed away:" adding, for the purposes of this case, "it is hardly material to enquire which."

The District Judge finds that such repairs had been before the Thakurs' purchase constantly made by the Fazilpore Zemindars, aided by the proprietors of adjacent villages, and that the Thakurs in proceeding to repair or renew the embankment were acting in the *bonâ fide* belief that they were entitled to do so. The Thakurs' people went in considerable numbers, apparently coolies, save five or six peadas. The District Judge finds that they were not more in number than was necessary for the purpose of repairing the *bund*, for which purpose they went; that they did not go to fight; that they did not go armed and ready to use force; and that they did not use force on this occasion.

Upon these findings, it follows that the acts of the Thakurs' party did not constitute an offence under the Indian Penal Code.

The party arrived at the spot at about 10 A. M. (two ghurries of the day), and worked at the *bund* until the afternoon, by which time they had raised it to a considerable height; and also made it of considerable width. While they were engaged on the work, different bodies of men in large numbers were seen gathering in the neighbourhood, and marching towards the spot with drums or tomtoms beating. The Thakurs' men sent a messenger to Bhagulpore Thannah, about 10 or 12 miles off, who, however, did not reach it until 11 P. M.

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At about 4 P. M. the bodies of men, previously seen gathering, came together to the number, as stated, of 1,200 in all, many of them armed with *lathies*, to where the work was going on, headed by the petitioners. Most of the Thakurs' party had either left, or then fled, and very few were left. Twenty-five or thirty men detached themselves from the main body and fell upon the Thakurs' men, five of whom were more or less severely wounded with *lathie* blows, and three left senseless on the ground. The assembly then dispersed. It is contended that these acts do not amount to rioting under the Indian Penal Code in the present case.

The Mohashoy's people wholly denied any right on the part of the Thakurs to construct or repair or to have in existence, in the river bed, any *bund* such as the Thakurs claimed. They had expressly denied the existence of any such right, and refused permission to the Thakurs to exercise it. They had done so, in communications which passed between the two zemindars, in October and November 1887.

The District Judge thought the evidence of these communications inadmissible as hearsay. We think they were admissible; although we do not think that, upon the fair construction of them, they at all negative the existence of that *bonâ-fide* belief on the part of the Thakurs in the right in respect of the *bund*, which the District Judge finds they had.

It is plain that on the part of the petitioners' master, the Mohashoy, the Thakurs' alleged right was strenuously denied; or, to put in different words his contention, his right to have the channel of the river free and unobstructed by any *bund*, was strenuously asserted by him a right in which, it may not be improper to remark, his villagers probably were interested as well as their landlord.

It is contended, under these circumstances, that the assembly of which the petitioners were members was not an unlawful assembly.

It is pointed out, with perfect justice, that they have not, nor has any one of them, been found guilty of inflicting the wounds, or any of the wounds inflicted on members of the Thakurs' party; so that, if they were not members of an unlawful assembly, they must go free.

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It is argued that the interference by the Thakurs' people with the channel of the river justified the assembly in coming to stop them from working there, and the show and the use of force in compelling them to do so. It was not expressly contended that the amount of injury inflicted on the persons wounded was, such as it was, within the right of the assembly to inflict; it was argued that it would not be fair to use the violence employed as evidence of an unlawful purpose in the coming of the assembly.

But the right under the law to use force was asserted in argument.

This contention was founded, partly on the words of the Indian Penal Code and partly on some of the decisions on that enactment.

It could hardly be supported, we venture to think, upon any supposed policy contemplated by the framers of the Code. The intention can hardly be imputed to the eminent persons who framed, or to the Legislature which enacted the Code of legalising, in certain cases, the levying of private war. We apprehend there can be no doubt that, according to English law, the assembly in this case would be an unlawful assembly, or that executing their purpose as they did, there would have been a riot, for which every member of the assembly would be liable.

Dalton's Justice of the Peace, in a passage constantly cited (as, for instance, in Burns, J. P., "Riot"), pp. 445-446, Ch. 137:—"Every man in peaceable manner may assemble a meet company (and may come) to do any lawful thing; or to remove or cast down any common nuisance done to them. Every private man, to whose house or land any nuisance shall be erected, made, or done, may in peaceable manner assemble a meet company with necessary tools, and may remove, pull, or cast down such nuisance, and that before any prejudice received thereby; and for that purpose, if need be, may also enter into the other man's ground. A man erects a weir across a common river, where people have a common passage with their boats, and divers did assemble with spades, crows of iron, and other things necessary to remove the said weir and made a trench in his land, that they did erect the weir, to turn the water, so

as they might the better take up the said weir, and they did remove the same nuisance. This was holden neither any forcible entry, not yet any riot.

"But in the cases aforesaid, if in removing any such nuisance the persons so assembled shall use any threatening words (as to say they will do it in spite of the other; or they will do it though they die for it, or such like words), or shall use any other behaviour, in apparent disturbance of the peace, then it seemeth to be a riot; and, therefore, where there is cause to remove any such nuisance, or to do any like act, it is the safest not to assemble any multitude of people, but only to send one or two persons, or if a greater number, yet no more than are needful, and only with meet tools, to remove, pull, or cast down the same, and that such persons tend their business only without disturbance of the peace or threatening speeches. For the manner of doing a lawful thing may make it unlawful."

Russell, 4th Edition, Vol. I, 380:—"But if there be violence and tumult, it has been generally holden not to make any difference whether the act intended to be done by the persons assembled be of itself lawful or unlawful; from whence it follows that if three or more persons assist a man to make a forcible entry into lands to which one of them has a good right of entry; or if the like number, in a violent and tumultuous manner, join together in removing a nuisance or other thing, which may be lawfully done in a peaceable manner, they are as properly rioters as if the act intended to be done by them were ever so unlawful. And if in removing a nuisance the persons assembled use any threatening words (such as, they will do it though they die for it, or the like), or in any other way behave in apparent disturbance of the peace, it seems to be riot.....If a large body of men assemble themselves together for the purpose of obtaining any particular end, and conduct themselves in a turbulent manner, either accompanied with acts of violence, or with threats and intimidation calculated to excite the terror and alarm of the Queen's subjects, this is in itself a riot, whether the end and object proposed be a just and legitimate one or not."

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The latter part of this passage is taken from Chief Justice Tindal's charge to the Stafford Grand Jury in 1842 (1).

We have, of course, to consider whether the Indian Penal Code has by omission or expression made a sort of violence or threat of violence lawful in India, which is criminal in England. The sections of the Code relating to the right of private defence of property were referred to.

Section 97, paragraph 2, is that which recognises in certain cases this right; and ss. 103, 104 and 105 lay down the limitations of it.

The first and leading characteristic of the right is, that it exists as against an act of theft, robbery, mischief, or criminal trespass, or an attempt to commit one of those offences. No such right is conferred, by any words in these sections, save as against the perpetrators of offences under the Penal Code. The Code confers a right of private defence not as against mere trespass, but as against crime. That is the general scope of it. There may perhaps arise cases of difficulty; cases *inter apices juris* must always, from time to time, arise, and when they do, be dealt with. But this is not such a case. Upon the findings of the District Judge, we must take it, that no offence was committed by the Thakurs' people. The matter does not rest there. The District Judge says that no case was made for the petitioners in the first Court of the exercise of the right of private defence. Nor was it. The defence made was, so far as it touched this question at all, one of civil trespass only. Again, it is shown, and was on another aspect of the case pressed upon us by Mr. *Woodroffe*, that long after the disturbance, the *bund* remained as it was when the attack took place. There was no water in the river to be then diverted. There was no pressing immediate necessity of a kind showing that there was not time to have recourse to the protection of the public authorities. Even apart from this, the District Judge finds it clear that the working party had been observed early in the day before the work could have progressed far; but in place of having recourse to the authorities, the Mohashoy's party, acting with deliberation, assembled, after preparation, in

(1) C. & M., 663.

great force, and went to stop the work at the *bund*. We do not think the right of private defence arose in this case.

Then it is argued that the assembly did not assemble to enforce a right or supposed right within the terms of s. 141.

On the morning of the 24th the Mohashoy was, it is said, in the enjoyment and possession of the right claimed, namely, to have the river channel free. When the assembly went there in the afternoon, they went not to enforce a right, but to defend a right. They went to prevent the continuance of acts which altered the *status quo ante*. It was not intended by the Code to make assemblies which are assembled in support of the *status quo* unlawful. An assembly to alter is unlawful; an assembly to defend is not. This, as we understand, is the argument.

This argument possesses some attractive subtlety. But we do not feel able to accept it. It is dangerous to attempt to lay down any general rule, and there may perhaps be cases in which an assembly to defend a right may not be unlawful; at least, we shall not now affirm that there cannot be. But to accept the general proposition enunciated would be a very different matter. There are many rights of which it may be affirmed that when they are interfered with, the defence of them consists in exercising them in despite of the interference, that is or may be, in enforcing them. There are modes of enforcing a right which are not prohibited by s. 141. What it prohibits is the enforcement of a right or supposed right by criminal force or show of criminal force by an assembly of five or more persons. And rights, the defence of which can only be effected by enforcing them, may come within its provisions.

The section refers to "right or supposed right." This would seem to make a division into: (1*st*) rights in actual enjoyment when interfered with; (2*nd*) rights claimed though not in actual enjoyment when interfered with. And this would again indicate that the section, in some cases at any rate, makes unlawful an assembly which by force, &c., defends the right by restoring the *status quo ante* and with it the actual enjoyment.

If the proposition contended for be true, then, not merely the right to the actual occupation of property in physical possession,

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but a right of way, a right to draw water from a well, a right to enjoy ancient lights, and many others, may, if interrupted, be vindicated by force or show of force. So long as they are uninterrupted, they are in possession so far as such rights can be. To defend them by force against interruption is to enforce them; and this, if done by five or more is, in many if not in most cases, forbidden by the law.

This proposition, in truth, embodies the view which was expressed by Campbell, J., sitting alone, in the case of *Queen* v. *Mitto Sing* (1) in the passage at page 43 beginning with—"I think that the latter provision applies to an active enforcement of a right not in possession, and not to the defence of a right in possession." It is not the judgment of a bench of this Court; and with great respect we dissent from this passage and from that which follows it, and decline to be bound by either.

Leaving the discussion of this general proposition which, if established, would be a defence in this case, we must refer to the judgment of Phear, J., in the Pachgachia case [*Shunker Singh* v. *Burmah Mahto* (2)] which was much relied on.

The Court there held that the right of private defence existed. The Pachgachia people were in "the enjoyment of the use of water which they were then having at the very time." The Amba people came to stop the water by force, if necessary. Phear, J., says: "They" (meaning the Pachgachia people) "were not bound under all circumstances to stand quietly by while their opponents wrongfully and by force committed serious mischief." We think we must take this as a finding upon the character of the act committed by the Amba people; and, that being the finding, the right of private defence arose, there not being time to have recourse to the authorities. The act of the Amba people was held to be an attempt to cause such a change in the property (the actual taking of the water then flowing being treated as property) as to affect it injuriously, and so to be an attempt to commit mischief.

Further, it appears on reference to the papers in the case, that the Pachgachia people had gone to keep their channel clear, and had remained on the spot during the night previous to the

(1) 3 W. R., Cr., 41. (2) 23 W. R., Cr., 25.

disturbance: they were actually in possession of the flow of water so far as that was possible; and the Amba people then came to stop it, and on the finding of the lower Court were the aggressors. Some of the language used in the case, no doubt, affords ground for the argument properly pressed upon us, that it decides in general terms that the maintenance of the actual subsisting enjoyment of a right is not the enforcement of a right within the meaning of s. 141. If the case could only be read as supporting that proposition, we should think it our duty to refer it to a Full Bench. We think, however, that it does not go so far as to decide that.

We understand the case of *Birjoo Sing* v. *Khub Lall* (1) also relied on to include a finding to a similar effect. Couch, C.J., says: "He (the petitioner) went there to do what persons had a right to do, *viz.* endeavour to prevent mischief being done to property which belonged to them; and I think that he cannot, under the circumstances that have been stated, be considered to have been a member of an unlawful assembly so as to be answerable for any acts of violence which were committed by the assembly or any member of it in prosecution of the common object."

In this case therefore, also, the defence of what was held to be property, against what was held to be mischief, constituted the justification accepted by the Courts.

In the present case, if the right claimed by the Thakurs does exist, their people were lawfully engaged upon the *bund* and the *bund* was lawfully there. The petitioners were members of an assembly, the common object of which was by show of criminal force, and by criminal force, if necessary, to enforce the right to keep the river channel clear, by preventing the construction of the bund and by demolishing it so far as it was constructed: though the demolition was not carried out after the effects of the violence used became apparent—a not unusual circumstance in this country. We think the case comes under s. 141, para. 4.

We see no reason for holding that any omission in the charge occasioned a failure of justice in the course of the three months' trial which took place.

(1) 19 W. R., Cr., 66.

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As to the *alibi* set up on behalf of prisoners 2 and 3, we see no reason to doubt that the District Judge fully considered the evidence bearing upon that question; and, so far as we may allow ourselves to express an opinion on the question of fact before him, we should say that we entirely agree with him. The letters are not satisfactory, and even if these accused were present at the well where the bodies are said to have been searched for on the day in question, that would not be inconsistent with their having been, as they are sworn to have been, at the riot afterwards.

We must discharge the rule to set aside the conviction.

But we think we are at liberty to diminish the severity of the sentence imposed. There was a serious question of right raised between the parties. The Thakurs' people stayed quiet after the refusal of permission in October-November until just before the rains were nigh; they were the persons to come on the ground with good reason to know they might be opposed. This does not furnish a justification for the accused; but it does, we think, entitle us to refrain from treating the case as one fit for the exemplary sentence imposed. We quite feel the importance of the District Judge's observations. But, under the circumstance, we think a sentence of six months' imprisonment will meet the ends of justice. We are happy that a line of argument in reply, which we feared might have rendered it impossible for us to reduce the sentence, was not pursued.

Subject to this reduction, we let the sentence stand as it is.

Rule discharged.

H. T. H.